Acts Constituting an Assault.

"I further charge you that if you find the defendant, without justification, shot a pistol in the direction of the witness, within carrying distance of the pistol, not intending to hit him but intending to scare him, he would be guilty of a (criminal) assault:" Held, to be a correct instruction. *Edwards* v. *State*, 62 S. E. Rep. 565 (Ct. of App. Ga., Oct. 12, 1908).

The above decision brings up the old but interesting question of what are the necessary elements of a criminal assault. Definitions of criminal assault are almost as numerous as the cases. The one most generally accepted, however, is that of Hawkins, "An attempt or offer, with force or violence, to do a corporeal hurt to another." Bishop defines it as an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being. These two definitions differ widely. The one judges the assault from the standpoint of the actor, the other makes the defense depend on the outward demonstration and its effect upon the person against whom it was directed. According to the latter view the defendant in the case under discussion could be guilty of an assault only if in fact he did frighten the witness—while under the former definition he might be guilty of an assault even though the witness upon whom the alleged assault was attempted was wholly ignorant of the attempted assault, and therefore free from alarm.[1] It is difficult to reconcile all the authorities upon this point. The question may be answered either way according to definition followed. The dictum of Baron Parke in a *nisi prius* case is that if a person presents a pistol which has the appearance of being loaded and puts the party into fear and alarm, he is guilty of an assault—for that is what it is the object of the law to prevent.[2] In 1843 Baron Rolfe expressed doubt upon this dictum,[3] and a year later Tindal, J., held it to be an assault only when the pistol was in fact loaded.

The lack of uniformity of view is still greater in America. In the case of *Chapman* v. *State* (78 Ala. 463), the Court holds that the pointing of an unloaded pistol at a person within shooting distance, in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a

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[1] *People* v. *Lilley*, 43 Mich. 525.

[2] *R.* v. *St. George*, 9 C. & P. 491.

[3] *R.* v. *Baker*, 47 Eng. C. L. R. 253.

civil action for damages. The case of *Com.* v. *White,* 110 Mass. 407 arrives at an exactly different conclusion upon identical facts. The one line of case proceeds upon the theory that an act does not become a criminal assault because it puts another in fear or tends to cause a breach of the peace; the other upon the theory that, "it is not the secret intention of the assaulting party nor the undisclosed fact of his inability to commit the battery that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

This conflict of view is due, in a considerable degree, to a failure to discern the distinction between civil and criminal assaults. The civil action for assault rests upon the invasion of a person's "right to live in society without being put in fear of personal harm." On the other hand the action for criminal assault must, upon the fundamental principles of the criminal law, rest upon the union of an act with a criminal intent or with criminal negligence. The object of the civil action is to compensate the injured party and therefore the law looks primarily to him and to the effect of the defendant's act upon him, rather than to the wrongdoer. In the criminal action the state is concerned with the wrongdoer and if the act was done with the necessary intent, the crime has been committed irrespective of the effect of the act upon the witness.

That the "effect upon the person against whom the act was directed," cannot be the test for a criminal assault, is shown by the class of cases which hold that an offer of violence conditioned may amount to an assault, although because of the condition stated at the time of the act no fear can be said to result from the act. "If you do so again, I will knock you down," held an assault although no fear was alleged by the party threatened.[4] All authorities are agreed that such a threat and act constitutes an assault because it shows that the defendant intends to apply the unlawful force unless the other forbears to do something he has a right to do. The courts are likewise agreed that the defendant who put his hand upon his sword and said, "If it were not assize time, I would not take such language from you," was guilty of no assault because he clearly had no intent to offer corporal violence to the witness.[5] These cases clearly show that the intent of the actor

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[4] *U. S.* v. *Myers,* 1 Cranch. C. C. 310

[5] *Com.* v. *Eyre,* 1 Serg. and R. 347.

and not the effect of the act upon the other party is the test for a criminal assault.

Applying this test to the case in hand it is clear that the defendant is not guilty of a criminal assault in shooting in the direction of the witness, within carrying distance of the pistol, not intending to hit him but only to scare him; unless it be held that the intent necessary need not be to do corporal injury but may be merely to frighten him. While the definitions practically all hold that the intent must be to do corporal injury to another, yet there are a few cases that hold that an intent to frighten or scare is sufficient.[6]

In the *State* v. *Tripplett*,[6] the Court said, "when the attitude or action of a party is threatening toward another, and the effect is to terrify, the offense of assault is complete." In *State* v. *Baker*,[6] the Court held in respect to an instruction similar to the one under review that, "firing a pistol in the direction of another with the intention of frightening him, or with the intention of wounding him, are equally assaults. There must be an intent to commit an assault, or else there can be no assault. Committing an assault need not be wounding. It may consist in frightening as well." Thus again we see that the difference of view rests upon the difference in the definition followed.

While the last line of cases is in direct accord with the instruction given by the lower court in the case under consideration, yet the instruction can hardly be reconciled with the cases that hold that there must be an actual intent and ability to commit a battery, and which seem to be more in accord with the fundamental conceptions of the criminal law. That shooting a gun in the direction of another within range and intending to scare him is a civil assault if it does frighten or that it may result in a breach of the peace and amount to a misdemeanor, is agreed. But such should not be held sufficient to sustain an action for criminal assault.

The cases in accord and contrary to the necessity of a present actual intent are collected in 4 Cent. Dig., Sec. 69; and in 3 Cyc. of Law & Pro., page 1020.

THE EXTENT OF PROPERTY RIGHT IN A TRADE MARK.

The facts in the case of *Correro* v. *Wright*, 47 Southern Reporter 379 (decided in the Supreme Court of Mississippi)

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[6] *State* v. *Tripplett*, 52 Kansas 678; *State* v. *Baker*, 20 R. I. 275.